

Service Date: June 29, 1992

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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| IN THE MATTER OF MONTANA POWER |) | UTILITY DIVISION |
| COMPANY, Complaint by DAVID C. |) | |
| MOGAN, Concerning Power Bills |) | DOCKET NO. 90.6.41 |
| and Termination of Service. |) | ORDER NO. 5630 |

HEARING EXAMINER'S PROPOSED ORDER

APPEARANCES

FOR THE COMPLAINANT:

David C. Mogan, 366 Minnesota Street, P.O. Box 366, Hinsdale, Montana 59241, appearing
pro se

FOR THE DEFENDANT:

W. Wayne Harper, Attorney at Law, 40 East Broadway, Butte, Montana 59701, appearing
on behalf of the Montana Power Company

FOR THE COMMISSION:

Kate Whitney, Consumer Representative, 1701 Prospect Avenue, Helena, Montana 59620

BEFORE:

Martin Jacobson, Staff Attorney, Hearing Examiner, Department of Public Service
Regulation, 1701 Prospect Avenue, Helena, Montana 59620

GENERAL INTRODUCTION

In June, 1990, David C. Mogan (Mogan) filed a Complaint with the Montana Public Service Commission (PSC) against Montana Power Company (MPC). In his Complaint, Mogan alleges a number of unlawful actions and "abuses of monopoly powers" by MPC in billing and termination of service activities directed to Mogan as the owner of two apartment buildings.

Mogan, a resident of Hinsdale, Montana, owns the Kirkwood Apartments in Hinsdale and the Rustic Valley Apartments in nearby Glasgow, Montana. MPC, a major public utility in Montana, is the sole supplier of electric power in Mogan's area and provides electric service to Mogan at his two apartments.

Mogan's allegations of unlawful actions and abuses primarily center on MPC's electric power billing procedures and threatened termination of service relating to the common elements (access and convenience areas and appliances which all tenants are free to use in common) of Mogan's two apartments.

By August, 1989, Mogan had become delinquent in amounts owed to MPC for service at the Rustic Valley Apartments. MPC then terminated Mogan from budget billing and notified Mogan of the delinquencies. Mogan and MPC soon after became involved in the early stages of a billing dispute relating to these accrued delinquencies and the removal from budget billing.

At this same time MPC also terminated budget billing at Mogan's Kirkwood Apartments. The reason for this termination remains unknown.

By the time of Mogan's June, 1990, Complaint to the PSC, the "disputes" had developed into more comprehensive problems including issues relating back to the time of construction of Mogan's apartments and continuing through various occurrences

up to the time of the Complaint and, in several instances (as will be later explained), even after the Complaint.

Pre-service representations or misrepresentations on the future rates for electric power, installation of a demand meter without notice, changes in rates without notice, termination of budget billing arrangements without notice, questionable delinquencies, repeated improper termination notices, and other related things are alleged in Mogan's Complaint and answered in MPC's defense.

Mogan's Kirkwood and Rustic Valley apartments are totally electric powered. Mogan's tenants have separate meters for all but the common elements, which are Mogan's responsibility as landlord. The Complaint incidentally involves tenants, as whatever affects the apartments' common elements will necessarily affect the tenants.

In April, 1990, a few months prior to Mogan's June, 1990, formal Complaint to the PSC, Mogan had registered an informal complaint with the PSC over MPC's cancellation of budget billing on his Rustic Valley account. Kate Whitney, PSC Consumer Representative, attempted to resolve the matter informally. Mogan states that this attempt, which essentially was favorable to MPC, was not satisfactory.

At sometime prior to his formal Complaint, Mogan had also filed a district court action, apparently relating to the same subject as in Mogan's Complaint. This was filed against MPC in the Seventeenth Judicial District, Valley County, and designated Cause No. 16875. The court action was either dismissed or continued on the basis that certain administrative action available before the PSC must first be pursued.

On December 17, 1990 Mogan amended his June 20, 1990, initial formal Complaint. The amendment includes a claim arising after the initial Complaint and relating to frozen water pipes and water damage allegedly resulting from MPC's discontinuance of service to one of Mogan's vacated tenant's apartments. Mogan asserts that this discontinuation of service is contrary to a standing agreement that MPC would place service in Mogan's name under such circumstances.

MPC has answered Mogan's initial and amended Complaint. MPC generally denies Mogan's allegations and asserts that it has, at all times, properly dealt with Mogan as a

customer. MPC claims that it has complied with its PSC-approved tariffs and the laws administered by the PSC. MPC counterclaims for Mogan's delinquent amounts owed on power bills or permission to terminate. MPC answers the water damage claim by alleging no jurisdiction in the PSC to decide such matter.

Hearing on this matter was held in Hinsdale, Montana, on November 14, 1991. Briefs have been submitted as of March 26, 1992.

PRELIMINARY COMMENTS

This proceeding has involved several things that should be commented on for further information to the parties and also to any person or entity charged with comprehensively reviewing this decision and the underlying administrative and evidentiary records. In part, these things might have some actual substantive bearing on this matter but, for the most part, they merely serve as background which should further assist review and place the analysis in this Order in perspective.

First, this proceeding has involved a significant number of motions and objections, both procedural and substantive, including relatively early motions from Mogan and MPC for summary dismissal. All of these (except Mogan's latest post-briefing request for rehearing, which is explained in the next section) have been disposed of and have little remaining significance for purposes of this Order.

However, in this regard, Mogan has been motion "prolific." Although Mogan has some legitimate points in his claims, these are somewhat difficult to reach as Mogan has a tendency to cloud them in unnecessary complexities and obvious misunderstandings. Mogan appears to have an endless ability to dig into matters and demand satisfaction for them regardless of practical importance or accurate legal basis. Depending on viewpoint this can be obnoxiously persistent or commendably persistent. Viewing it as obnoxiously persistent distracts from the merits of Mogan's legitimate points.

Second, Mogan and MPC have demonstrated no particular fondness for each other. Although this also does not matter one way or the other on the merits of the claims, it has served to promote a sadly deficient willingness (or ability) for cooperation between the parties. Also, in certain instances, it has made parts of this case appear to be an unnecessary contest or

polarization between Mogan's apparent steadfast adherence to certain philosophical "principles" and the apparent comfort MPC has in its natural inability, as a large corporation, to maintain perfection or prevent "innocent" minor "neglect" in its dealings with customers. There are several obvious things that both Mogan and MPC could have reasonably admitted, conceded, or agreed to in this matter if a sense of reasonable cooperation could have prevailed. Both Mogan and MPC have been weak in this regard -- neither more than the other.

Third, Mogan has appeared without legal counsel throughout this proceeding. Whether this has been by design or necessity is not known. Mogan has referenced this pro se status several times in requesting that certain accommodations be made for his lack of legal sophistication in the matter. Certain accommodations have been extended to Mogan, but they have been limited at the point that such would begin infringing on MPC's rights as a defendant. For the most part, Mogan has been required to carry his Complaint through this proceeding by his own efforts. As much "accommodation" as is practical and not prejudicial to MPC has been, and will continue to be, extended to Mogan.

Fourth, although legally and procedurally correct given the adversarial nature of administrative contested cases and, in part, also justified by Mogan's own approach to this matter, MPC, at some crucial junctures, treated this matter in a fashion that is not necessarily becoming of public utility status under the circumstances. Mogan, as a customer of MPC, as a pro se litigant and obvious fish out of water in the legal arena, reasonably is fairly entitled to some cooperation by MPC in developing a complete factual record.

MPC, although legally and strategically correct in not doing so, could have appeared at hearing with known potential witnesses and evidence to build a more complete factual record or, at least to accommodate Mogan in attempting to do so. If that would seem unduly offensive to MPC, MPC could have done so to assist the PSC in developing a complete record. When a relatively small business or residential customer, regardless of personality quirks or offensiveness, takes on the task of challenging a major public utility, there is no reasonable need for the public utility to call upon every available procedural strategy. In fact, courtesy and accommodation should be the guiding principles. Nevertheless, legally, MPC cannot be faulted in this regard.

Fifth, Mogan has, in part, seriously misconstrued the law governing several, but not all, procedural and substantive aspects of this matter. This, and Mogan's method of arguing, orally or in writing, has even caused MPC to claim that several of Mogan's submittals, including Mogan's Brief on the Merits, are too "convoluted" for direct response. Mogan's approach to parts of this matter is somewhat difficult to follow and understand and, in some instances, just wrong, but it is not "convoluted" to the degree that understanding is impossible.

Sixth, parts of Mogan's arguments are based on authority contained in the Bible, which, as a recognized basis for one or more significant faiths in this world, might well govern in some "higher" order, does not happen to subject itself well (or legally) to being the direct authority for resolving those types of problems that are present in this administrative action. The law governing the present matter is the law administered in the state of Montana, primarily, in this instance, the statutes and rules administered by the PSC. Mogan's cited Biblical "authorities" are by no means nonsense, just inapplicable as direct authority for resolving the issues in this matter.

POST-BRIEFING MOTION FOR REHEARING

On May 13, 1992, Mogan requested, by Motion for Rehearing, that the PSC reopen hearing on the matter for the reason that, allegedly, on April 28, 1992, MPC actually terminated electric service to one of the accounts controlled by the Complaint and MPC has, furthermore, actually sent additional termination notices to Mogan. Mogan argues that these actions by MPC are contrary to the law and further demonstrate MPC's disregard.

The procedural basis for Mogan's request is ARM 38.2.4805, which permits the PSC to reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require rehearing. Mogan's Motion was preceded by a Motion to Amend Pleadings to Conform to Proof and accompanied by a request for subpoenas to witnesses.

The Motion for Rehearing and all requests related to MPC's alleged termination on April 28, 1992, are denied and the Motion is dismissed. The reasons are: (a) allegations of subsequent acts are not "evidence" justifying "conformance of pleadings to proof"; (b) a Complaint cannot be amended after submission of the case -- the allegations of actual

termination raise a new and separate issue not included in the Complaint and are not a basis for rehearing provided in ARM 38.2.4805; and (c) prior PSC rulings in this matter (Notice of Commission Action, May 14, 1991, and Notice of Hearings Examiner Action, May 14, 1991) conditionally permit MPC to continue to send notices of, and prepare for, termination pending the outcome of this overall matter. The ARM 38.2.4805 rehearing procedure contemplates new evidence bearing on existing issues, not new causes of action.

DISMISSAL OF CERTAIN CLAIMS

The PSC has power to supervise, regulate, and control public utilities to the extent that Title 69, MCA, provides. However, Title 69, MCA, does not happen to provide direct jurisdiction in the PSC over all claims against, or by, public utilities.

Although the PSC remains interested in all activities involving public utilities and could and would become directly involved by exercising its general supervisory powers over public utilities in the event similar claims were a common occurrence justifying general supervision, it cannot hear and decide these particular matters case by case. The PSC simply has no jurisdiction over several of the "issues" submitted for determination. Regardless of pleadings, proof and arguments submitted, and, furthermore, any prior rulings in this matter, the following claims are dismissed for the reasons stated.

First, Mogan's claim concerning MPC's misrepresentation of the future rates for electric service is dismissed. In this claim Mogan asserts that MPC "duped" him into a situation wherein the rate for electric service is now far in excess of that represented at the time of construction of his apartments. Mogan asserts that he would have chosen natural gas over electric service had he known that operational costs resulting from demand meters (the related issue involving installation of demand meters is not dismissed) would have been so high.

There is no evidence that MPC "duped" (assumed to mean "actionably misrepresented") Mogan into a situation wherein the rate for electric service is now far in excess of that represented by MPC to Mogan at the time of construction of Mogan's Kirkwood and Rustic Valley apartments. However, it makes no difference whether there is evidence or not, as the claim is outside the scope of those matters that the PSC has authority to decide and grant

relief. Mogan's claim concerning being "duped" is dismissed. The PSC has no subject matter jurisdiction over such particular claim. The proper forum for such claim, if there even is any basis for it, is in a court having jurisdiction.

Second, Mogan's claim concerning MPC's breach of an MP-070, MPC's "landlord agreement," and frozen water pipes and resulting damages at one apartment in Mogan's Kirkwood Apartments is dismissed. Mogan's claim is outside of the scope of those matters that the PSC has authority to decide. The PSC has broad authority over the operations of public utilities, but that authority does not directly extend to individual consumer's claims for damages arising from acts of a public utility. Title 69, MCA, does not permit the PSC to hear and decide this type of claim. The PSC has no subject matter jurisdiction in this instance. The proper forum for such claim, assuming that the problem cannot be reasonably settled, is in a court having jurisdiction.

Third, both Mogan's and MPC's claims for costs and attorney fees are dismissed. Mogan's and MPC's claims are outside the scope of those matters for which the PSC normally has authority to grant relief. Neither Title 2, chapter 4, MCA (MAPA), nor Title 69, MCA (PSC administered statutes), nor the administrative rules implementing the same allow for attorney fees or costs in this matter. Furthermore, even if it were the case that such could be an available remedy, the requests would be denied on the basis that no party can properly be considered as the obvious "prevailing" party (as this Order will show). Each party would necessarily bear his or its own costs and attorney fees.

ISSUES OF FACT AND LAW FOR DETERMINATION

The following "issues" identify and describe the remaining contested factual and legal questions raised through the pleadings, motions, and arguments of the parties and which, according to the parties final arguments, remain pending a ruling. These "issues" include the claims and requests for relief.

As a preliminary comment, it is somewhat difficult, but far from impossible, to follow the actual development of factual and legal issues in this matter. Mogan's understanding of the concept of pleadings, proof, and argument and the connections among these things is less

than perfect. "Issues" have appeared, disappeared, and reappeared throughout this matter. For this reason the issues identified in the parties' final arguments will be those which constitute the remaining issues.

The first issue is whether MPC has breached its budget billing system agreements or otherwise violated the law in relation to these agreements at Mogan's Kirkwood and Rustic Valley Apartments.

The second issue is whether MPC has dramatically increased its rates for electric service, through installation of demand meters or otherwise, or changed the way in which rates are computed so as to amount to a dramatic increase, at Mogan's Kirkwood and Rustic Valley apartments and, if so, whether the same was done unlawfully.

The third issue is whether, insofar as MPC has notified Mogan of termination of service at Mogan's Kirkwood and Rustic Valley apartments, MPC has violated the law governing such termination notices.

The fourth issue is, if MPC has violated the law (in any or all of the above issues), what are Mogan's remedies, including whether MPC can and should: (a) be compelled to reinstate budget billing at Mogan's Kirkwood and Rustic Valley Apartments; (b) be compelled to remove the demand meter at Mogan's Rustic Valley Apartments; (c) be restrained from terminating service at Mogan's Kirkwood and Rustic Valley apartments; and (d) be compelled to strike Mogan's delinquencies, if any, at the Kirkwood and Rustic Valley Apartments.

The fifth issue is whether Mogan is delinquent in amounts owed to MPC for electric service and, if Mogan has failed to pay accrued delinquencies, whether MPC can and should terminate service to Mogan's Kirkwood and Rustic Valley apartments.

FINDINGS OF FACT

Any or all of the material in the foregoing paragraphs which properly can be considered Findings of Fact, in whole or in part, and should be considered as such to preserve the integrity of this Order are incorporated herein as Findings of Fact.

The PSC hereby takes official or administrative notice of all MPC's current and superseded tariffs and operating rules on file with the PSC. These shall be referenced herein, where applicable, with or without further reference to official or administrative notice.

Mogan owns the Kirkwood Apartments in Hinsdale and the Rustic Valley Apartments in Glasgow. The exact year of Mogan's construction of these apartments is unknown, but appears, from indirect references made at hearing and in briefing, to be at sometime in the early to mid-1980's.

MPC has provided electric service to Mogan's Kirkwood and Rustic Valley apartments since the time of construction. Mogan also has other accounts with MPC for electric service, but these are not in issue.

For the common elements or areas of Mogan's apartments, Mogan apparently has been served by MPC under MPC's Electric Tariff, General Service, Schedule No. GS-1 (prior to mid-1988, the applicable tariff appears to have been GS-84). GS-1 (and its apparent predecessor) includes a monthly service charge, energy charge, and demand charge.

Mogan was placed on MPC's budget billing system for both apartments in the few years after their construction. The exact date that Mogan was placed on budget billing for each apartment building is believed, through indirect references made at hearing and in briefing, to be at least by December, 1986.

MPC's budget billing (formerly Monthly Average Payment System or "MAPS") is a system which approximately averages total annual payments equally per month during a year of service, normally to spread the higher winter month billing amounts throughout the year. It fixes an approximate even-dollar amount for monthly payments and readjusts that amount on the customer's budget billing service anniversary, to average accumulated excesses or deficiencies through the monthly payments in the following year.

MPC's applicable Electric Tariff Rule No. 10, provision 10-2, allows for budget billing. This operating rule expresses budget billing in general concept, but no specific details of implementation are included. Further details in MPC's budget billing service, other than that described above, are unknown.

In March, 1988, MPC installed a demand meter on Mogan's Rustic Valley Apartments. In general, according to MPC's applicable GS-1, demand meters measure the average kilowatts supplied during the 15 minute period of a customer's maximum use during a month. Apparently, this measurement is used to assist in fixing the demand charge for the billing period.

MPC gave no notice to Mogan of the installation of the demand meter. Failure of MPC to provide notice of installation of a demand meter under the circumstances of this case is unreasonable. Mogan was deprived of any opportunity to understand the potential effect or make adjustments in usage or seek alternatives.

The demand meter caused an increase in Mogan's monthly bill for electricity at his Rustic Valley Apartments. The exact amount of the increase caused by the installation of the demand meter is unknown. Mogan later argues that it caused a 60 percent to 80 percent increase. MPC later argues that it caused an insignificant increase.

Certainly, under normal circumstances, a 60 percent to 80 percent increase in power bills would have made Mogan aware that something had occurred significant enough to make inquiry. Mogan made no inquiry at that time. Under normal circumstances, Mogan's failure to make inquiry would be unreasonable and, most probably would have compounded whatever problems now exist.

However, it must be kept in mind that Mogan was on MPC's budget billing system. Under budget billing, absent notice of the change, even a reasonably prudent customer might not immediately recognize changes in billing amounts until a deficiency had accumulated and the average monthly payment was revised accordingly.

Also, MPC's applicable superseded tariffs show that MPC electric rates under GS-1 (and apparent former GS-84) which were effective in March, 1988 (date of MPC's installation of the demand meter), up to August, 1989 (date budget billing "dispute" arose) did increase after installation of the demand meter and, therefore, the "immediate" increase might not have been obviously "noticeable" to Mogan in any event.

The changes, roughly and in extreme summary, amounted to a \$.39/month increase in service charge, a \$.008/kwh winter and \$.003/kwh summer increase in kwh for the

first 2,500 kwh per month, and a \$2.05/kw winter and \$1.85/kw summer increase for over 10 kw demand per month.

As is apparent, the only substantial change was to the demand charge. Furthermore \$1.45/kw winter and \$1.53/kw summer, the bulk of the period's increase, occurred effective in December, 1988, shortly before the time at which Mogan's "delinquency" began to accumulate significantly more than it would have under normal budget billing alone (a "deficiency" will normally accumulate during the winter season).

Mogan had an approximate \$896 "deficiency" as of MPC's August, 1989, billing date. If two payments which had not been properly made (returned checks explained later) and the August bill, which was not yet due, are accounted for, the "deficiency" at this time was roughly \$380. Considering that only five summer months were involved from the last time Mogan had a "zero" balance, Mogan's above estimation of the increase caused by the demand meter ("60% to 80%") is more correct than MPC's ("insignificant") as the deficiency for this period alone calculates to about an average \$60 to \$70 increase per month.

Again, as described above, although the increase was not necessarily immediate, Mogan's rates eventually increased significantly and the demand meter, and accompanying tariffed increases in demand charges through time, appears to be the only identifiable cause.

Other than the demand meter issue applying only to the Rustic Valley account (and the questions remaining in regard to the demand meter), there is no evidence that MPC has otherwise dramatically increased rates for electric service or changed the way in which it computes rates so as to amount to a dramatic increase at Mogan's two apartments.

MPC removed Mogan's Rustic Valley and Kirkwood Apartments from the budget billing system in August, 1989. MPC states that this action at the Rustic Valley Apartments was a result of two checks being returned unsatisfied, arrearage of about \$896, and current usage in excess of 4000 kwh.

About \$340 of Mogan's August, 1989, arrearage applicable to the Rustic Valley apartments was caused by two checks not paid by Mogan's credit union because the credit union had "gone broke." About five weeks later Mogan paid the amount of the returned checks (total, approximately \$370).

MPC had no reasonable cause to understand the basis for Mogan's returned checks or to treat them any differently than any other payment by check returned unsatisfied. MPC's termination of Mogan's Rustic Valley budget billing appears reasonable on this basis alone (except for lack of notice discussed later).

There is no evidence supporting a reason for termination of budget billing at Mogan's Kirkwood Apartments. MPC's termination of Mogan's Kirkwood budget billing appears unreasonable.

MPC did not give Mogan notice of termination of budget billing prior to termination, or after termination, at either of Mogan's apartments. Apparently MPC customarily does not notify customers of the cancellation of budget billing arrangements. It is unreasonable for MPC not to notify customers, including Mogan, of termination of budget billing.

On or about August, 1989, this same time of termination from budget billing, MPC began notifying Mogan of delinquent amounts at his apartments. This notification appears to have been limited to the monthly billing statements.

Until August, 1989, the time that this dispute arose, Mogan had a good credit history with MPC for all accounts. After August, 1989, Mogan has not had a good credit history with MPC, primarily because of the Rustic Valley account.

At least part of the reason for Mogan's present poor credit history might be influenced by the determination of this matter. Nevertheless, on the books of MPC Mogan is delinquent in amounts owed to MPC.

At the time of termination from budget billing, or soon after, discussions between Mogan and MPC occurred -- Mogan questioning cancellation of budget billing and asserting contractual rights and MPC asserting delinquencies and no contractual rights. The exact time, frequency, and nature of any communications exchanged at this immediate time is not known.

MPC delivered a first Rustic Valley Apartment termination notice to Mogan on March 21, 1990. The notice stated that termination was scheduled for April 4, 1990, and provided information for questions or payment.

Mogan and MPC were sporadically communicating in regard to the dispute at this time. Mogan states that he had been "negotiating" with MPC prior to and at this time and also that he disputed the entire amount of the bills at this time. MPC states that it did not know Mogan disputed the entire amount of the bills.

In April, 1990, Mogan informed MPC that he disputed the amount of the bill. It is unreasonable for MPC to conclude that Mogan did not mean the entire amount of the bill. Whether Mogan legally or factually could dispute the entire amount of the bill is irrelevant. The fact remains that he did dispute it.

In March or April, 1990, Mogan registered an informal complaint with the PSC, through its Consumer Representative. The informal resolution did not resolve the matter to Mogan's satisfaction.

The PSC Consumer Representative issued her informal opinion letter on April 11, 1990. MPC then notified Mogan of termination at the Rustic Valley Apartments again.

MPC hand delivered a first Kirkwood Apartment termination notice to Mogan on May 6, 1991. The notice stated that termination was scheduled for May 13, 1991, and provided information for questions or payment.

Shortly after that, Mogan's power at the Kirkwood Apartments was out for about 30 minutes. There is no evidence connecting the outage with the notice.

On June 20, 1990 Mogan filed this formal Complaint with the PSC. On July 6, 1990 the PSC issued a Notice of Complaint to MPC.

MPC's lack of knowledge that Mogan then disputed the entire amount of the amounts owed was then reasonable on the basis that Mogan's Complaint does not clearly dispute those amounts up to the former budget billing amounts.

Insofar as Mogan's Kirkwood Apartments are concerned Mogan, at least to the date of hearing, has continued to pay MPC at the billing amount deemed correct by Mogan -- the former budget billing amount.

Insofar as Mogan's Rustic Valley Apartments are concerned Mogan, at least to the date of Complaint, continued to pay MPC the billing amount deemed correct by Mogan -- the former budget billing amount.

Since the Complaint Mogan has not paid MPC any amount accrued at the Rustic Valley Apartments. As of the date of hearing the accrued amount was about \$5,400, which was approximately \$4,400 more than that owed at the time Mogan filed his informal complaint with the PSC.

MPC sent additional notices to Mogan, relating to both apartments, after the date of the Notice of Complaint. MPC apparently also sent additional notices to Mogan's tenants after the date of the Notice of Complaint. MPC has made specific scheduled terminations of service to Mogan and his tenants in all notices.

MPC did not notify the PSC of termination at either the Kirkwood Apartments or the Rustic Valley Apartments. MPC has not actually terminated service to either of Mogan's apartments.

The PSC authorized termination notices after May 14, 1991, by Notice of Commission Action on that same date. This authority did not include authority for actual termination.

CONCLUSIONS OF LAW

Any or all of the material in the foregoing paragraphs, including Findings of Fact, which properly can be considered Conclusions of Law, in whole or in part, and should be considered as such to preserve the integrity of this Order are incorporated herein as Conclusions of Law.

MPC is a public utility pursuant to Section 69-3-101, MCA. As a public utility, MPC is subject to the authority of the PSC as provided in Title 69, MCA (public utilities and carriers). Mogan, as a person served by MPC, has the right to file a Complaint against MPC pursuant to Section 69-3-321, MCA (complaints against public utility).

Except as might have been otherwise determined herein as to particular issues dismissed, the PSC has jurisdiction over this Complaint pursuant to the provisions of Title 69, MCA.

All procedures and proceedings were conducted and disposed of in accordance with the law governing Complaint proceedings before the PSC, including that prescribed in: Title 69, MCA; ARM Title 38, Chapter 2 (PSC procedural rules); and Title 2, Chapter 4, MCA (MAPA).

Mogan, as the complainant, has the burden of establishing that the Complaint is justified. This burden contemplates substantial credible evidence on all claims.

Mogan has prefaced most claims and arguments with a position that electricity constitutes a thing indispensable and a necessity of life. Mogan accompanies this position with several adverse arguments on MPC's monopoly status and the nature of public utilities. Mogan connects basic necessities with sustaining life, property, safety, health, and happiness and "inalienable rights" to pursue the same. Generally, MPC finds these claims and arguments incomprehensible.

Mogan's intentions underlying this claim are unclear, as Mogan does not connect them to any request for relief and, therefore, leaves to the imagination the reason for the claims. For lack of a better reason, it might all be viewed as asserting some unconditional right to receive electric service from MPC. However, Mogan has previously disclaimed such intention.

Whatever the case, Mogan's "prefacing claims" (if they are claims) serve as an interesting narrative which might be the basis of some philosophical debate, time allowing, but the claim and related arguments have not been connected to anything for which relief can be known or granted. The "issue" or claim, if it even is one, is dismissed and the matter is considered prefacing argument only and applied accordingly.

Pertaining to Mogan's Kirkwood and Rustic Valley apartments, it is self-evident that Mogan and MPC have entered into a basic electric service agreement. Also, the parties agree that Mogan was on MPC's budget billing system at both Mogan's apartments. Together these agreements establish no more than MPC will provide service and Mogan will pay for that

service under the terms of the agreements and the lawful tariffs of MPC (to which the law permits changes through time).

Both of these agreements can be categorized as "contracts" in the loose sense that mutual obligations are created in an environment involving exchange and real expectations. Neither of these, however, is a "contract" in an all-encompassing sense. For example, if it were Mogan's argument that budget billing entitles him to the same fixed monthly billing amount in perpetuity, it cannot be maintained. MPC's rates, the prices that it charges, and its rules of service, are strictly regulated and subject to change and, legally, MPC could not so contract. Furthermore, there is no evidence that MPC did even attempt to so contract.

To place public utility service into the pure "contract" arena has little logic for instances such as basic service and budget billing service to Mogan. The law generally governs this type of utility and customer relationship to the exclusion of private contracts or at least to the extent that they are rendered somewhat meaningless as they cannot depart from the provisions prescribed in law.

The relevant point, however, is that MPC and Mogan, for both of Mogan's apartments, entered into a budget billing arrangement. Whether such is properly called an "agreement," "contract," or like thing is immaterial. In substance it is a part of the public utility operations in providing service to customers and is subject to rules governing the same.

Insofar as budget billing amounts are concerned, MPC has not "breached" these budget billing "agreements" or otherwise violated the law governing them in making any changes in monthly amounts due. Budget billing does not establish rates -- it establishes an acceptable monthly payment, apparently amendable at anytime, but usually on the anniversary of the service, to make monthly payments meet average monthly rates. The budget billing system clearly contemplates changes in amounts to be paid. MPC can legally amend the monthly payment due, so long as it is calculated in accordance with the stated goal of budget billing.

Termination of budget billing, however, is another matter. MPC provided no notice of termination at either Mogan's Kirkwood Apartments or Rustic Valley Apartments. Notice of termination from budget billing is required.

MPC argues that there is no law requiring notice of termination of budget billing. MPC is correct in the sense that there is no written law using the terms "notice of termination of budget billing" that expressly imposes an obligation to notice prior to its termination.

However, MPC's budget billing system, as provided by MPC's Electric Tariff Rule No. 10, contains no provisions that express or envision any exception from or departure from laws governing any other MPC rates or rules of service.

MPC's budget billing system, if not a type of service itself, is at the least a significant incident connected to a service of MPC as a public utility. When MPC extends budget billing to a customer, MPC is providing a service to that customer. In this regard termination of service rules apply.

Prior to company-initiated termination of budget billing, MPC must notify the affected customer by proper notice just as if it were terminating any other type of service. Certainly, in the context of budget billing, the bulk of the rules in ARM Title 38, Chapter 5, Subchapter 14, have no reasonable application, however such parts as require minimal and informative notice and a reasonable period for discussion and settlement do have applications.

Furthermore, failure to give informative notice is unreasonable. A customer should have a right to expect, in any context of fair dealings, that notice of termination in an applicable billing system will be conveyed along with the reasons therefor.

Because MPC did not provide notification, MPC's termination of budget billing at Mogan's Kirkwood and Rustic Valley Apartments is invalid. MPC can and should be compelled to reinstate budget billing at Mogan's apartments. This absolutely does not mean or imply that the pre-August, 1989 budget billing amounts need be in effect. Current factors, including present rates, delinquencies, and this Order shall be considered in calculating the proper monthly average payment.

Additionally, MPC provided no evidence of reason or cause for termination of budget billing relating to the Kirkwood Apartments. Mogan argues this is a form of discrimination, imposed because he refused to submit to the edicts of MPC. Mogan argues that

MPC must provide budget billing at the Kirkwood Apartments without discrimination. Mogan argues that MPC cannot terminate budget billing at the Kirkwood Apartments without reason.

MPC's budget billing system is a service. Like all services MPC must apply it to any class having access to it without discrimination. Termination for no reason is arbitrary. MPC does not have this type of authority to render or withhold service at will for no reason.

MPC argues that Mogan's Rustic Valley Apartments' budget billing was terminated because unsatisfied checks, a high delinquent balance, and usage in excess of 4000 kwh. MPC argues that the returned checks caused review and termination for the reasons stated. Mogan argues that the budget billing was terminated because of the amounts accrued because of the demand meter.

As indicated above, except for the notice provision, MPC's termination of budget billing at the Rustic Valley Apartments was, at the least, rational (the demand meter issue affects this however). The provision of being above 4,000 kwh has no apparent basis, but delinquencies are sufficient in and of themselves.

MPC violated the law when it terminated budget billing to Mogan at his Rustic Valley Apartment, because it gave no notice. The termination is invalid and the budget billing should be reinstated. The amount of the monthly average payment can and should be properly based on current factors, including the provisions of this Order.

MPC also violated the law when it terminated budget billing to Mogan at his Kirkwood Apartment, because it had no reason and it gave no notice. The termination is invalid and the budget billing should be reinstated. The amount of the monthly average payment can and should be based on current factors, including the provisions of this Order.

MPC installed a demand meter at Mogan's Rustic Valley Apartments in 1988 without notice. This effectively deprived Mogan of any information upon which to make choices which could have mitigated any resulting rate increase.

MPC's applicable tariffs allow for demand charges. If usage at Mogan's apartment justifies installation of a demand meter, one can be installed. However, one cannot be installed without notice.

It is true that demand is a component of the applicable service and tariffed as such, however, unless initially installed at the time service commences, such does not give absolute or unqualified authority to install or remove a demand meter at will without some form of reasonable notification and informative communication.

ARM 38.5.1501(2) requires notice to consumers of rate increases. Mogan argues that this would apply to installation of demand meters. If rates (effective rates) are affected by the installation of a demand meter, then this provision applies.

Additionally, installation of a demand meter without notice is simply an unreasonable action. A customer of a public utility has a right to expect that information on "discretionary" actions or events by a public utility, resulting in changes to "rates" or billing amounts, will be communicated so that decisions can be made to mitigate the impacts.

MPC's installation of a demand meter at Mogan's Rustic Valley Apartments was done unlawfully and MPC can and should be compelled to remove that demand meter. This in no way states or implies that a demand meter cannot be installed, but only after notice -- meaningful notice including explanation of the potential effect.

Furthermore, MPC can and should be compelled to credit Mogan's account for the increase resulting from the demand meter. For purposes of this Order this increase resulting from installation of the demand meter will be referenced as "excessive amounts."

Precisely what these "excessive amounts" are is not accurately determinable by the record. MPC can and should be compelled to calculate these "excessive amounts" from the date of the installation of the demand meter to the date that the demand meter is removed.

MPC argues that the demand meter bills were extremely close to the prior bills. As a matter of fact this does not appear to be the case, but if it is the case, the impact on MPC will be minimal.

Mogan argues that the use of demand meters constitutes an unfair burden on him. Outside of MPC's failure to provide notice, this is not the case. Mogan is a member of a class of customers which is subject to demand charges. The demand charges are prima facie just and reasonable, as are all other approved rates in effect. No evidence exists to overcome this.

Mogan argues that all termination notices at the Kirkwood Apartments and Rustic Valley Apartments are in violation of PSC rules. This is, at least partially, correct. MPC has clearly violated the law governing such termination notices, including in tenant situations.

ARM Title 38, Chapter 5, Sub-chapter 14, provides for the PSC rules on termination of electric service. These rules are applicable to service for residential purposes. Although Mogan is a general service customer, the service is for resident purposes. Mogan is a "customer" under ARM 38.5.1401(1)(b) and a "landlord customer" under ARM 38.5.1401(1)(f). These rules are clear and unambiguous as applicable to this matter. MPC's Electric Tariff, Rule No. 13, Sheet Nos. R-13.1 through R-13.17 adopt, what appear to be, identical rules (legally, MPC's rules could not differ, in any event).

A utility may terminate service to a customer for nonpayment of a delinquent account. ARM 38.5.1402(1)(a). The utility must give notice to the customer prior to termination. ARM 38.5.1405.

As indicated above, Mogan is a landlord customer of MPC. Pertaining to landlord customers, a public utility's first notice of termination must be sent at least 30 days prior to the proposed date of termination. ARM 38.5.1405(2)(c).

MPC did not comply with this rule in its dealings with Mogan. Both the first notice at the Kirkwood Apartments (May 6, 1991) and the first notice at the Rustic Valley Apartments (March 21, 1990) had proposed termination dates within only 15 days of MPC's in-house date of publication. In the case of the Kirkwood Apartment the notice was hand-delivered seven days before proposed termination.

The notices are invalid. MPC acted unlawfully in these notices of termination. In this regard, to alleviate any other problem that might arise through MPC's subsequent notices which might have the same or another deficiency, all subsequent notices are declared invalid.

Upon issuance of this Order and compliance therewith, if termination of Mogan's electric service is proposed, MPC must first issue a valid notice to Mogan as a landlord customer at least 30 days prior to the proposed termination. In addition, MPC must comply with all other PSC rules pertaining to termination.

Also there is some strong indication of further MPC violation of notice provisions in this matter. If these actually exist, they would justify no further remedy to Mogan. However, MPC should apprise itself of the rules and understand the possible violations.

Some of these for MPC's consideration are: ARM 38.5.1405(2)(d) which requires supplemental notice to tenants, but such may not be given earlier than five business days following issuance to the landlord; ARM 38.5.1405(2)(d) which prohibits notice to tenants when the landlord disputes the amount owing, until the dispute is resolved; and ARM 38.5.1409 which prohibits a notice of termination for nonpayment if the entire amount is disputed by the customer and the customer is currently negotiating with the utility or has filed a complaint with the PSC (however, it permits notice with respect to that portion of an account which is not disputed).

It would serve no further purpose to attempt to identify further violations of termination rules which might have occurred in this matter. The remedy to Mogan is already as complete as it can be in this regard. However, MPC, including its local agents, must understand and properly apply the rules in all instances.

ARM 38.5.1417 requires notice to the PSC before termination of service involving tenants. This rule, and all other rules pertaining to actual termination, is not applicable because MPC did not actually terminate service. There is a clear legal distinction between notice of termination and termination. MPC only issued notices of termination, it did not effectuate termination. Mogan argues that May 6, 1991, notice of termination at Kirkwood Apartments must be sent to PSC prior to termination, citing ARM 38.5.1417(1). Mogan is confused in this regard. MPC must notify the PSC prior to actual termination -- not prior to or at the time of notice of termination.

Insofar as MPC's notices may have constituted a real threat of imminent termination which should be treated as "actual termination," the law does not support such

argument. To the extent that there was a "threat" in violation of law, it has been disposed of above.

There is no evidence or reasonable basis to infer that MPC acted maliciously or recklessly in any action against Mogan. The acts appear to be mere neglect.

Mogan has not paid on delinquent accounts. He owes money to MPC for electric service at the Rustic Valley Apartments, alone, amounting to in excess of \$5,000. Some of the amounts owed as of certain dates specified will be offset by "excessive" charges explained in the terms of this Order. The balance will be "remaining amounts" as referenced in this Order. "Remaining amounts" are delinquencies.

Nonpayment of a delinquent account is grounds for termination of service. ARM 38.5.1402(1)(a). There is no legal reason why MPC should be restrained from terminating service at Mogan's Kirkwood and Rustic Valley apartments for any "remaining amounts" delinquent after all necessary calculations and other requirements are done in accordance with this Order. There is no legal reason why Mogan's "remaining amount" delinquencies should be stricken.

MPC can and should terminate service to Mogan's Kirkwood and Rustic Valley apartments on the basis of nonpayment of "remaining amounts" delinquent, so long as MPC properly terminates in compliance with the terms of this Order and all applicable rules of the PSC governing termination, including in landlord and tenant situations.

The overall nature of this matter does not justify that further sanctions be imposed on MPC, for any unlawful conduct of MPC identified above. However, a reasonable means of mitigating the impacts of this decision on Mogan is justified. As will be further explained in the Order section, a two year period for collecting delinquent amounts or "remaining amounts" shall be imposed.

Mogan and MPC have both requested "any other relief" that the PSC deems warranted. Except as might be otherwise provided in this order, no "other relief" is warranted and the requests are denied.

ORDER

Any or all of the material in the foregoing paragraphs, including Findings of Fact and Conclusions of Law, which properly can be considered as an Order, in whole or in part, and should be considered as such to preserve the integrity of this Order are incorporated herein as an Order.

All claims, arguments, motions, objections, proposals, and like matters, raised by Mogan or MPC, and not otherwise disposed of in this Order are denied.

IT IS HEREBY ORDERED that MPC shall forthwith and no later than 30 days following the service date of this Order:

- a. Remove the demand meter at Mogan's Rustic Valley Apartments and not reinstall it until proper and informative notice is given to Mogan and Mogan has an reasonable opportunity to cur tail usage to remain outside of the category for demand meters (if such is even possible). Fifteen days from the notice of intended installation shall constitute "reasonable opportunity" in this instance.
- b. Calculate the "excessive amounts" -- being those amounts charged to Mogan as a result of the demand meter at the Rustic Valley Apartments, from the date of installation to the date of removal. Credit Mogan's account pertaining to his Rustic Valley Apartments for all amounts in excess of those which would have been in place absent a demand meter.
- c. Calculate the "remaining amounts" separately for Mogan's Kirkwood and Rustic Valley Apartments.
- d. Return Mogan to budget billing at his Kirkwood and Rustic Valley Apartments at an average amount applicable today and pursuant to the terms of this Order, and not further terminate budget billing without proper notice to Mogan and for cause.
- e. Once the "excessive amounts" and "remaining amounts" are calculated, provide Mogan with a program to which he has reasonable opportunity to pay the delinquent "remaining amounts" plus his monthly budget billing amounts over a period of two years.
- f. Provide the PSC with copies of all correspondence and work papers generated in compliance with this Order. For purposes of this Order "work papers" shall clearly show each calculation and each fact relied on for that calculation, including reference to the applicable

tariffs in effect at each period within the time of installation to the time of removal of the demand meter.

g. MPC is not prohibited from terminating service to Mogan in the event that Mogan refuses to agree to the above-delineated program or fails to make payments at the time due under the terms of the program, unless enforcement of this Order is stayed by the PSC or any Court having jurisdiction over this matter. Any such termination must strictly adhere to the rules of the PSC on termination, including in landlord and tenant situations (this Order neither waives nor amends any rule governing termination of service).

DONE AND DATED this 22nd day of June, 1992.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

MARTIN JACOBSON, Hearing Examiner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: This Proposed Order is a proposal for decision only. Each party has the opportunity to file exceptions, present briefs, and have oral argument before the Public Service Commission prior to a Final Order. See, Section 2-4-621, MCA. If any party chooses to file exceptions the exceptions and supporting briefs must be filed within 20 days of the service date on this Proposed Order. Briefs opposing exceptions must be filed within 10 days thereafter. Oral argument, if requested, must be requested at or prior to the time of briefing. See, ARM 38.2.4803 and 38.2.4804.